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BEFORE THE
Federal Communications Commission
WASHINGTON, DC 20554

In the Matter of

QUALCOMM Incorporated

Application for Pioneer's Preference

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GEN Docket No. 90-314
File No. PP-68

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Federal Communications Commission
Office of General Counsel

**REPLY COMMENTS OF
PRIMECO PERSONAL COMMUNICATIONS, L.P.**

PRIMECO PERSONAL
COMMUNICATIONS, L.P.

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PrimeCo Personal Communications, L.P.^{1/} ("PrimeCo") hereby files its reply comments pursuant to the *Public Notice* issued in the above-captioned proceeding on February 25, 1997.^{2/}

I. SUMMARY

PrimeCo was surprised to learn through the *Public Notice* clarifying the *ex parte* status of QUALCOMM Incorporated's ("QUALCOMM") application for pioneer's preference that it had been made a party to the proceeding. More surprising was the *Public Notice* statement that PrimeCo's interest in that proceeding arose from "the possible conflict between QUALCOMM's preference application and the previously granted applications for the A and B

^{1/} PrimeCo is a limited partnership comprised of PCSCO Partnership (owned by NYNEX PCS, Inc. and Bell Atlantic Personal Communications, Inc.) and PCS Nucleus, L.P. (owned by AirTouch PCS Holding, Inc. and U S WEST PCS Holdings, Inc.). PrimeCo is the B Block broadband PCS licensee for the Miami-Ft. Lauderdale MTA. PrimeCo is also the licensee, or owns a majority ownership interest in the licensee in the following broadband PCS MTAs: Chicago, Milwaukee, Richmond-Norfolk, Dallas-Ft. Worth, San Antonio, Houston, New Orleans-Baton Rouge, Jacksonville, Tampa-St. Petersburg-Orlando, and Honolulu.

^{2/} *Ex Parte Status Clarified: In the Matter of QUALCOMM Incorporated, Application for Pioneer's Preference*, DA 97-423 (rel. Feb. 25, 1997).

block licenses in the Miami-Ft. Lauderdale MTA.”^{3/} This statement, buried in the *Pubic Notice*, represents the first suggestion that PrimeCo’s B Block broadband personal communications service (“PCS”) authorization for the Miami-Ft. Lauderdale MTA is not a final and binding license grant. PrimeCo submits that, for the reasons stated herein, there is no basis for Commission revocation of the PrimeCo Miami-Ft. Lauderdale license. Further, the Commission has full discretion to fashion an alternative appropriate remedy *in the event* it determines that QUALCOMM should receive a pioneer’s preference grant.

II. INTRODUCTION/BACKGROUND

QUALCOMM’s pioneer’s preference application proceeding began some five years ago on May 4, 1992 when QUALCOMM submitted an application to the Commission requesting a preference for Southern Florida relating to certain experimental work the company had conducted in the PCS frequency bands in San Diego, California.^{4/} On February 4, 1994, the Commission denied QUALCOMM’s application^{5/} and QUALCOMM ultimately appealed that

^{3/} *Id.*

^{4/} On February 21, 1992 the Commission granted QUALCOMM an experimental license (Call Sign KK2XB, File No. 2345-EX-PL) to conduct PCS experiments in the 1850-1990 MHZ band in San Diego, California. On March 13, 1992, the Commission granted QUALCOMM Special Temporary Authority (Call Sign KA2XPW, File No. S-1020-EX-92) to conduct experiments in the 1710-1776.5 MHZ band.

^{5/} *In the Matter of Amendment of the Commission’s Rules to Establish New Personal Communications Services*, Third Report and Order, GEN Docket No. 90-314, 9 F.C.C.R. 1337 (1994), remanded in part by, *Freeman Eng’g Assocs. v. FCC*, 103 F.3d 169 (D.C. Cir. 1997) (“*Third R&O*”).

decision to the U.S. Court of Appeals for the District of Columbia Circuit in the consolidated case of *Freeman Engineering Associates v. FCC*.^{6/}

During the pendency of this proceeding, the Commission allocated the broadband PCS spectrum and established spectrum blocks. Thereafter, the Commission undertook the A and B Block PCS auctions in which Sprint Spectrum ("Sprint") and PrimeCo won the A and B Block licenses, respectively, for the Miami-Ft. Lauderdale MTA. PrimeCo and Sprint paid for their licenses, filed all necessary FCC applications and received final license grants. PrimeCo's license was not conditioned upon the outcome of the pending QUALCOMM matter. Further, QUALCOMM did not participate in the auction for the Miami-Ft. Lauderdale MTA, nor did it challenge the issuance of the licenses to Sprint or PrimeCo or take any other action to defend its interest in that specific market. Consequently, PrimeCo acted in reliance upon its license award and expended scores of millions of dollars developing its PCS network in the Miami-Ft. Lauderdale market, which is now operational and serving customers.

On January 7, 1997, the *Freeman Engineering* Court remanded QUALCOMM's pioneer's preference application on the grounds that the Commission had inconsistently applied its pioneer's preference rules to the detriment of QUALCOMM.^{7/} Thereafter, on January 31, 1997, according to a recent *ex parte* report filed by QUALCOMM, QUALCOMM met with Commission staff purportedly to discuss how the Commission should proceed with regard to the remand.^{8/}

^{6/} *Freeman Eng'g Assocs. v. FCC*, 103 F.3d 169 (D.C. Cir. 1997).

^{7/} *Id.* at 180.

^{8/} Letter from Veronica M. Ahern, counsel to QUALCOMM Incorporated, to William F. Caton, Secretary, Federal Communications Commission (Mar. 5, 1997) ("*Ex Parte* letter"). The *Ex Parte* letter recounts an incredible discussion concerning the

On February 18, 1997, the Office of Engineering and Technology issued a *Public Notice* requesting comments and reply comments from interested parties regarding what action it should recommend to the Commission in light of the court's remand.^{2/} QUALCOMM submitted short comments on February 24, 1997, urging the Commission to grant its application for pioneer's preference on an expedited basis.

As discussed below, in these reply comments PrimeCo reminds the Commission that despite QUALCOMM's desire for haste in this matter the remand order in *Freeman Engineering* in no way mandates the grant of a pioneer's preference to QUALCOMM. The Commission must still adjudicate the merits of QUALCOMM's application. Further, even if the Commission determines that QUALCOMM is eligible for pioneer's preference, the Commission may not lawfully grant that preference for the Miami-Ft. Lauderdale MTA — which has been the subject of two final license grants to qualified parties. Instead, the Commission has broad discretion to craft an appropriate remedy that will address QUALCOMM's interests — in the event a pioneer award is justified — while protecting both the legitimate interests and

QUALCOMM remand. First, the letter makes no mention of additional proceedings to determine whether QUALCOMM should, in fact, receive a pioneer's preference award on remand. Second, with respect to Sprint's prior final license grant for the Miami-Ft. Lauderdale MTA, the *Ex Parte* letter states that the "[t]he [Commission] staff asked whether the Commission would be required to refund the auction price to Sprint if it granted QUALCOMM's pioneer preference." Later, when the discussion turned to whether Sprint should be present at the January 31 meeting, FCC staff concluded "that it did not seem necessary at this time since Sprint was not a party to QUALCOMM's pioneer's preference request." The *Ex Parte* letter also indicates that PrimeCo's status as the B block licensee for the Miami-Ft. Lauderdale MTA was not discussed at the January 31, 1997 meeting. Despite this omission, however, PrimeCo was made a party by the February 25 *Public Notice*. PrimeCo is hopeful that the serious issues raised by this proceeding will be given more careful consideration in the future.

^{2/} *Filing Period Announced for Comments on QUALCOMM's Pioneer's Preference Application*, DA 97-351 (rel. Feb. 18, 1997).

expectations of the existing broadband PCS licensees in the Miami-Ft. Lauderdale MTA and the public.

III. THE COMMISSION MUST FIRST RULE ON THE MERITS OF QUALCOMM'S PIONEER'S PREFERENCE REQUEST PRIOR TO REACHING THE ISSUE OF AN APPROPRIATE REMEDY

PrimeCo concurs with QUALCOMM's understanding that the remand in *Freeman Engineering* "requires the Commission to review the merits of QUALCOMM's preference request."^{10/} However, PrimeCo rejects QUALCOMM's assertion that the Commission is required to "treat QUALCOMM in the same manner as it did other applicants" and therefore "must grant QUALCOMM's request."^{11/}

Put simply, the *Freeman Engineering* decision requires the Commission on remand to remedy any inconsistency in its application of its standards for reviewing pioneer's preference applications.^{12/} In the QUALCOMM case, the Commission denied the application for pioneer's preference based upon the "developed specifically for a particular service" standard.^{13/} In a previous case involving a pioneer's preference application filed by Omnipoint Communications ("Omnipoint"), however, the *Freeman* Court found that the Commission granted a preference based upon application of a different standard — the "associated with a licensable service" test.^{14/} Thus, the *Freeman* Court found the Commission's application of two

^{10/} Comments at 2.

^{11/} *Id.*

^{12/} *Freeman Engineering* at 180.

^{13/} *Id.*; *Third R&O* at 1346.

^{14/} *Freeman Engineering* at 180.

separate standards to be arbitrary and capricious and accordingly remanded the matter for “further proceedings to remedy this inconsistency.”^{15/} It must be emphasized that *nothing* in the *Freeman* decision requires the grant of QUALCOMM’s pioneer preference application, the issuance of a license to QUALCOMM, the issuance of a particular broadband MTA license to QUALCOMM, or even the use of the standard adopted in the Omnipoint matter.^{16/}

Therefore, while QUALCOMM’s desire that the Commission hastily grant its application for pioneer’s preference without further record proceedings is understandable, the fact is that the Commission is bound to carefully and fully review the record in this matter including these and any other reply comments, and adopt any necessary additional procedures *prior* to addressing the merits of QUALCOMM’s application. Further, even if the Commission determines to grant QUALCOMM the requested preference, that grant does *not* equate to the grant of a license, and certainly not a grant of either the A or B Miami-Ft. Lauderdale MTA licenses. Preferees are not automatically entitled to licenses; rather, they enjoy the privilege of not having to compete against mutually exclusive applicants for a particular license.^{17/} Moreover, as discussed below, any effort by the Commission to grant QUALCOMM Block A/B Miami-Ft. Lauderdale PCS authorizations would be unlawful and contrary to the public interest.

^{15/} *Id.*

^{16/} Federal agencies are permitted to change their legal policies and standards as long as they provide a reasonable explanation for the change. *See generally Motor Vehicle Mfrs. Assn. v. State Farm Mut.*, 463 U.S. 29 (1983); *National Black Media Coalition v. FCC*, 775 F.2d 342 (D.C. Cir. 1985).

^{17/} 47 C.F.R. § 1.402(c)(1996). Indeed, the *Freeman* court found that Commission grant of a pioneer’s preference to be an agency action subject to review separately from the grant of a license based upon the pioneer’s preference. *Freeman Engineering*, 103 F.3d at 178. In other words, a pioneer preference award is *not* a license grant, despite QUALCOMM’s claims to the contrary. *See Ex Parte letter* at 2-6.

IV. THE COMMISSION MAY NOT LAWFULLY GRANT AN A/B BLOCK MIAMI-FT. LAUDERDALE PCS LICENSE TO QUALCOMM

QUALCOMM's comments urge the staff of the Office of Engineering and Technology to "recommend that the Commission expeditiously grant QUALCOMM's pioneer's preference request."^{18/} QUALCOMM's original application for pioneer's preference requested PCS spectrum in the "Southern Florida area, or whatever region the Commission defines to include Miami and surrounding communities."^{19/} This request covers spectrum that crosses what is now designated as the A and B Block broadband PCS spectrum in the Miami-Ft. Lauderdale MTA.^{20/} PrimeCo and Sprint are the A and B Block licensees for that MTA and their license grants for the market are final.^{21/} Thus, a grant of QUALCOMM's original request for the market area included in the application could arguably require revocation of the A and/or B broadband PCS licenses in the Miami-Ft. Lauderdale MTA under Section 312 of the Communications Act of 1934.^{22/} PrimeCo submits, however, that revocation in this instance would be arbitrary and capricious and therefore unlawful.

^{18/} QUALCOMM Comments at 3. Notably, it is not clear that QUALCOMM is even seeking the Miami-Ft. Lauderdale A/B broadband PCS license on remand.

^{19/} QUALCOMM Request at 2.

^{20/} 47 C.F.R. § 24.229 (1996).

^{21/} On June 23, 1995, the Commission released a public notice, pursuant to delegated authority, indicating that the PCS license applications filed by PrimeCo (File No. 27-CW-L-95) and Sprint (formerly Wireless Co., L.P.) (File No. 26-CW-L-95) for the Miami-Ft. Lauderdale MTA were granted effective that same date. On that same day, the Wireless Telecommunications Bureau denied petitions to deny all 99 A/B Block PCS licenses. *Applications for A and B Block BroadBand PCS Licenses*, Order, 11 F.C.C.R. 3229 (WTB 1995). Applications for review of that denial order were filed on July 21, 1995 and were denied by Commission order dated March 28, 1996. *Applications for A and B Block Broadband PCS Licenses*, Order, 11 F.C.C.R. 17062 (1996).

^{22/} 47 U.S.C. § 312(a) (1994).

Nothing has occurred to warrant revocation of the broadband licenses for the Miami-Ft. Lauderdale MTA, and revocation in such circumstances would be unprecedented and unsupportable. Further, PrimeCo had no notice that QUALCOMM's application represented any threat to its Miami-Ft. Lauderdale MTA license. The license was not conditioned on QUALCOMM's pending litigation. Further, and as discussed below, while QUALCOMM requested preference in Southern Florida, nothing in the pioneer's preference rules required that the Commission grant a preference in the area requested by the applicant. In addition, following denial of its application, QUALCOMM did nothing to preserve its interest in the Miami-Ft. Lauderdale market or any interest in the MTA licenses at issue. QUALCOMM did not: 1) petition the Commission to withhold the Miami-Ft. Lauderdale MTA from auction; 2) participate in the MTA auction; 3) Petition to Deny any application filed for an MTA license; or 4) seek reconsideration of any Commission MTA license grant, including the Miami-Ft. Lauderdale license grants awarded to PrimeCo and Sprint. In short, neither the Commission nor QUALCOMM took any action that would, either actually or constructively, place PrimeCo on notice that its Miami-Ft. Lauderdale MTA PCS license was potentially at risk of revocation.

Under the circumstances, revocation of PrimeCo's license by the FCC would be patently absurd. To start, PrimeCo invested approximately \$125 million to obtain the B Block license for the Miami-Ft. Lauderdale MTA. Since license grant, PrimeCo has made enormous capital and labor investments in building out its Miami system in reasonable reliance on the finality of its license and the "high" expectancy of license renewal.^{23/} PrimeCo has undertaken an aggressive build-out schedule and expended scores of millions of dollars in capital

^{23/} *Amendment of the Commission's Rules to Establish New Personal Communications Services*, Second Report and Order, 11 F.C.C.R. 7700, 7753 (1993); *see also* 47 C.F.R. § 24.16 (1996).

investment, microwave relocation and system expenses. PrimeCo expects to continue its aggressive build-out activities and, for example, intends to more than double the number of its existing cell sites in the Miami-Ft. Lauderdale market by the end of next year. PrimeCo also has four retail outlets in Miami and employs approximately 150 people^{24/} in that market. By the end of this year, PrimeCo also expects to expand its retail presence and add additional employees. Based upon its extensive efforts to date, PrimeCo's system currently covers a population of approximately 4 million people, out of an available population of 5 million.

Under the circumstances, a revocation of PrimeCo's license would strip PrimeCo of the value of its enormous investment of effort and capital in the Miami market, undermining the reasonable, investment-backed expectations of a qualified licensee and legitimate license holder. Indeed, such action may well rise to the level of a confiscatory taking prohibited by the Fifth Amendment of the Constitution of the United States.^{25/}

Further, revocation of PrimeCo's license would directly contravene the public interest. As is evident from the above, PrimeCo has promptly deployed PCS service which serves the public interest by providing consumers with additional communications choices and additional wireless competition.^{26/} Revocation of PrimeCo's license would undermine all of the significant public interest benefits currently provided by PrimeCo as a licensee in the Miami-Ft.

^{24/} Including independent contractors.

^{25/} While it may be argued that a federal license is not a protected property interest, PrimeCo submits that the Commission has not encountered a situation where a qualified licensee faced revocation after paying \$125 million for a spectrum license, and scores of millions more based upon the finality of that license grant.

^{26/} PrimeCo further serves the public interest by employing a significant number of people in the Miami market and through other activities such as the donation of computer and other electronic equipment to local public schools.

Lauderdale MTA, with no justification. In sum, PrimeCo submits that revocation of its license would be unlawful as an arbitrary and capricious agency action contrary to the public interest.

While PrimeCo recognizes that the Commission has previously conditioned licenses on the outcome of pending litigation, PrimeCo submits that this prior Commission precedent is inapposite in this case.^{27/} Indeed, all but one of the cases cited by QUALCOMM do not deal with a disputed pioneer's preference request, but rather are cases in which a particular license that was being sought was subject to litigation by a party which had an preexisting interest in that particular license.^{28/} Unlike these earlier cases, however, QUALCOMM was not litigating a preexisting interest in a particular license, and the *Freeman Engineering* appeal did not involve a licensing award.^{29/} In fact, QUALCOMM was never licensed for the Miami area, never applied to be licensed for the Miami Block A/B MTA area and, despite the inclusion of South Florida in its pioneer's preference application, had no reasonable assurance that it would receive a broadband PCS preference for the Miami area. Further, QUALCOMM never challenged the Miami Block A/B license grants. Thus, there is no reasonable basis for concluding that PrimeCo's or Sprint's license was subject to preexisting litigation.

^{27/} In its *Ex Parte* letter QUALCOMM cites several cases that it suggests demonstrate that "licensees take their licenses subject to pending litigation." See *Ex Parte* letter at 2-3.

^{28/} *Auction of IVDS Licenses*, 1997 FCC LEXIS 13 (1997) (stay of auction denied pending appellate review of license revocation); *CCI RSA, Inc.*, 8 F.C.C.R. 1183 (1993) (deferral of license grant denied pending review of tentative selectee's application dismissal); *ASDA Answer Service*, 1 F.C.C.R. 753 (1986) (approval of settlement agreement among competing paging applicants); *Alianza Federal de Mercedes v. FCC*, 539 F.2d 732 (D.C. Cir. 1976) (television station renewal grant affirmed).

^{29/} Again, and as stated by the *Freeman Engineering* Court, grant of a pioneer's preference and grant of a license based upon pioneer's preference to two distinct actions. See *supra* n.17. Thus, QUALCOMM's application for pioneer's preference in Southern Florida, which was the subject of the *Freeman Engineering* appeal, cannot be construed as an application for license for the Miami-Ft. Lauderdale MTA.

In addition, while the Wireless Telecommunications Bureau's ("WTB") decision in *Wireless Co., L.P.*, cited by QUALCOMM relates to litigation involving a pioneer's preference application, it also does not support QUALCOMM's position. Importantly, the case does not hold that final broadband PCS license grants are subject to pending pioneer's preference litigation.^{30/} In that case, Advanced MobileComm Technologies ("AMT") and Digital Spread Spectrum Technologies ("DSST") petitioned the Commission to "dismiss, deny, or defer applications for the San Francisco and Boston MTA licenses"^{31/} because of the pendency of their appeal of the Commission denial of their applications for pioneer's preference in those markets. The WTB concluded that there were no grounds for denying, dismissing or deferring the PCS license applications, but did not reach the question of whether to condition the broadband PCS licenses.^{32/}

V. THE COMMISSION HAS THE DISCRETION TO GRANT QUALCOMM AVAILABLE BROADBAND SPECTRUM

Although the Commission may not lawfully revoke PrimeCo's B Block license in favor of QUALCOMM, PrimeCo submits that the Commission does have the discretion to grant

^{30/} *Wireless Co. L.P.*, 10 F.C.C.R. 13233 (1995).

^{31/} 10 F.C.C.R. at 13233.

^{32/} *Id.* at 13234. The WTB did suggest in *dicta*, however, that it may "elect to rescind the A block licenses and award them" to petitioners if they were successful in their pioneer's preference appeal. *Id.* at 13236. To the extent that this *dicta* by the Bureau (not the Commission) suggests even the remote possibility that a final PCS license may be subject to revocation based upon pending collateral litigation — the case is wrong. As discussed above, there was no challenge made to the Miami-Ft. Lauderdale license grant and no conditional grant given. For the reasons discussed herein, PrimeCo's authorization is not revocable under the circumstances presented.

QUALCOMM a pioneer's preference for an area other than the Miami-Ft. Lauderdale MTA.^{33/} Indeed, nothing in the pioneer's preference rules limits the Commission's discretion and authority to determine the appropriate available geographic area or spectrum over which a pioneer preference award holder may exercise its limited preference benefits.

The Commission's stated goal for the pioneer's preference was "to create an incentive for innovation by establishing a certainty that an otherwise qualified applicant will be able to participate in the proposed service."^{34/} Significantly, the Commission did not indicate that it intended to allow preference holders to participate in the proposed service in the market of their choice. Thus, while the Commission did adopt a general policy to "permit the person receiving the preference to select the one area of licensing that it desires to serve,"^{35/} this is simply regulatory policy, not a binding legal obligation of the Commission. Accordingly, pioneer's preference applicants have no reasonable expectation that they would necessarily receive a preference in the area included in their application, and certainly no right to an award for any requested area.

This is particularly true where, as in this case, there are existing qualified broadband PCS licensees whose legitimate interests would be trampled if the pioneer's preference applicant were given the opportunity to select the area it desires to serve without regard to existing license authorizations. It is among the Commission's fundamental obligations

^{33/} As noted previously, QUALCOMM conducted experimental operations in San Diego, but requested Southern Florida as the area for its pioneer's preference.

^{34/} *Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation of New Services*, Report and Order, GEN Docket No. 90-217, 6 F.C.C.R. 3488, 3495 (1991).

^{35/} *Id.*

under the Communications Act to allocate spectrum and grant licenses only to the extent that the “public convenience, interest, or necessity” so requires.^{36/} As discussed above, where existing qualified licensees, such as PrimeCo or Sprint, have acquired a final FCC license and invested enormous sums in developing state-of-the-art broadband PCS systems, revocation of that license in the absence of licensee wrongdoing and solely to favor a third party would utterly fail to serve the public interest. Thus, for the Commission to grant QUALCOMM a license based upon QUALCOMM’s arbitrary selection of a geographic area after spectrum allocation and licensing would be wholly unreasonable and contravene the public interest standard set forth in the Communications Act.

Given the Commission’s discretion and authority in this area, PrimeCo urges the Commission, in the event it determines that QUALCOMM is eligible for pioneer’s preference, to grant QUALCOMM preference for available spectrum and markets. To that end, PrimeCo notes that there are 30 MHz C Block BTA licenses that are currently available. Indeed, and most appropriately, QUALCOMM has expressed its willingness to consider such an alternative preference market and spectrum.^{37/}

PrimeCo supports this approach. First, as noted above, assuming that QUALCOMM is awarded a pioneer’s preference and found otherwise qualified to hold a Commission license, this proposal would save all parties to this proceeding countless money and effort reaching the inevitable conclusion that QUALCOMM has no legal claim to a PCS license for the Miami-Ft. Lauderdale MTA. Second, the proposal saves the Commission time and effort

^{36/} See 47 U.S.C. §§ 303, 309(a).

^{37/} In particular, QUALCOMM expressed an interest in the Phoenix C-Block BTA license. *Ex Parte* letter at 2.

reauctioning the Phoenix BTA license or whatever other available BTA licenses the Commission might find appropriate in the present circumstances. Third, the proposal would allow QUALCOMM to utilize its preference (if granted) in the manner originally intended — to make an exclusive license application for available frequencies. Finally, QUALCOMM's proposal will facilitate accelerated development and competition of wireless services without in any way hindering development and competition in the Miami-Ft. Lauderdale PCS market.

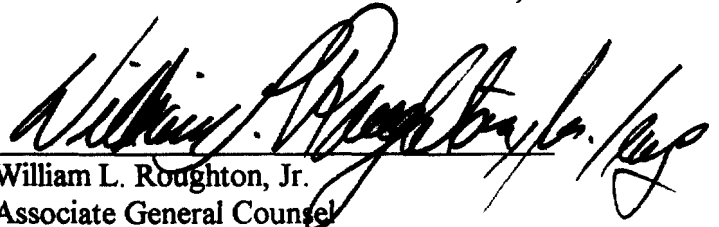
VI. CONCLUSION

For the foregoing reasons, PrimeCo submits that if the Commission determines that QUALCOMM is eligible for pioneer's preference, the Commission may not lawfully grant that preference for the previously allocated and awarded Miami-Ft. Lauderdale MTA license authorizations. Instead, the Commission has broad discretion to craft an appropriate remedy that will address QUALCOMM's interests while protecting the legitimate interests and expectations of existing broadband PCS licensees and the public.

Respectfully submitted,

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Date: March 20, 1997

CERTIFICATE OF SERVICE

I, Jo-Ann Grayton, do hereby certify that I have, on this 20th day of March, 1997, caused to be served by first class U.S. mail, postage prepaid, a copy of the foregoing Reply Comments of PrimeCo Personal Communication, L.P. to the following:

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